FILE COPY

AUG 22 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
A Corporation, *Petitioner,*

vs.

E. E. JOHNSON, Administrator of Benjamin F. Cooksey,
Deceased.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JNO. S. BARBOUR, RESPONDENT
Attorney for ~~Petitioner~~, Resp
Tower Bldg.,
Washington, D. C.

W. F. MOFFETT,
Washington, Virginia.

BURNETT MILLER,
Culpeper, Virginia.
Attorneys for the Administrator of Benjamin F. Cooksey, deceased.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Statement of the Facts	2-7
Assignments of Error	7
Questions Involved	7
Argument	8-18
Questions Involved and Authorities in Support of our position with reference to the Questions	19-21
Conclusion	21
Quotations from Policy	2, 3, 4
Quotation from Eagan case	9-10
Quotation from Bergholm case	11-12
Sections 4315 and 4317 of Virginia Code	13-14
Quotations from Opinion in Circuit Court of Appeals	15-16
Particular reference to Swann case	17

TABLE OF CASES CITED:

McMaster v. New York Life Ins. Co., 182 U. S. 25, 46 L. Ed. 64	19
Osborn v. Rogers, 1 N. Y. Sup. 623, 624, 49 Hun. 245	19
Pashley v. Third Methodist Church, 42 N. E. 13	19
Arnot v. Union Salt Co., 79 N. E. 718	19
Renner v. Bank of Columbia, 9 Wheat 581, 584	19
Minnesota Mutual Life Ins. Co. v. Marshall, 29 Fed. (2d) 977	9, 20
Stratton v. New York Life Ins. Co., 155 Va. 269	20
Harrison v. Provident Life Ins. Co., 141 Va. 659, 671	20
Atlantic Life Ins. Co. v. Swann, 156 Va. 852	20, 21

	Page
New York Life Ins. Co. v. Curry, 115 Ky. 100, 61 L. R. A. 268, 103 Am. St. 297	20
Knights of Columbus v. Burroughs, 107 Va. 688, 17 L. R. A. (N. S.) 246	20
U. S. v. Bank of N. C., 6 Pet. 29, 8 L. Ed. 308	20
Wiggins v. Knights of Pythias, 31 Fed. 122, 125	20
Josephine Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 72 L. Ed. 395	20
Peoria Life Ins. Co. v. Bergholm, 50 Fed. (2d) 67	20
Royal Ins. Co. v. Martin, 192 U. S. 149, 162, 48 L. Ed. 385, 389	20
Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. Ed. 866, 870	20
National U. F. I. Co. v. Burkholder, 116 Va. 942, 948	21
Continental Cas. Co. v. Lindsay, 11 Va. 389, 391	21
Insurance Co. v. Boykin, 12 Wall, 433, 20 L. Ed. 433, 39	21
R. & D. R. R. v. Powers, 149 U. S. 43, 45, 37 L. Ed. 412 413	21
North River Ins. Co. v. Becnel, 33 Fed. (2d) 231, 232	21
Bass v. N. & W., 100 Va. 1, 8	21
Bernstein v. Bord, 146 Va. 670	21
U. S. S. L. I. and T. Co. v. Massey, 164 S. E. 529	8, 21
Whitfield v. Aetna Life Ins. Co., 205 U. S. 489, 501	21
Metropolitan Life Ins. Co. v. Conway, 252 N. Y. 449, 169 N. E. 642	21
Northwestern Mutual Life Ins. Co. v. Johnson, 254 U. S. 96, 65 L. Ed. 155	21
Sec. 4228 Virginia Code	8, 21
Secs. 4315 and 4317 Virginia Code	13
Egan v. New York Life Ins. Co., 67 Fed. (2d) 899	8, 9
Fountain & Herrington v. Mutual Life Ins. Co., 55 Fed. (2d) 120	14
N. Y. L. Ins. Co. v. Cravens, 178 U. S. 389	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 154

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
A Corporation, *Petitioner,*

vs.

E. E. JOHNSON, Administrator of Benjamin F. Cooksey,
Deceased.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The cause presented here, shows a procedure by notice of motion in a state court to recover upon a policy of life insurance, which cause at the instance of defendant in the notice was removed to the United States District Court for the Western District of Virginia, where a jury was impaneled to try the issues raised. At the close of the evidence submitted by the plaintiff in the notice of motion, on motion of the defendant, the presiding judge directed a verdict for the defendant, and final judgment was entered upon the verdict from which the plaintiff appealed to the United

States Circuit Court of Appeals for the Fourth Circuit where the judgment of the District Court was reversed, and from which latter judgment a petition has been submitted to this Honorable Court for a writ of certiorari. (Opinion of Judge Soper, pp. 99 to 105, Record.)

I.

A STATEMENT OF FACTS.

On May 16, 1930, the Mutual Life Insurance Company (who for the sake of brevity will be hereinafter referred to as petitioner), issued to Benjamin F. Cooksey, (who for the like sake of brevity will be hereinafter referred to as Cooksey), its policy of insurance No. 4335235. Cooksey died on the 20th of January, 1932.

In consideration of the application and the first annual premium of $185.04, of which $31.99 was for the disability benefits thereunder, and the payment of a like amount upon each 16th day of May, petitioner agreed, 1st, *to pay* the Insured's beneficiary Forty-Five Hundred Dollars upon receipt of due proof of the *death,* and, 2nd, "If the Insured is totally and Presumably permanently disabled before age, 60, will *pay* him Forty-Five Dollars monthly during such disability, *besides* waiving *premium payments",* upon certain conditions set forth in an addendum of conditions attached to the policy. These assumpsits on the part of the Company are *all* that is contained on the *face* of the policy. The limiting conditions relied on by the defendant to release it from its express promises do not appear on the face, but are only referred to.

Section 3 of these "super-added conditions" printed on page 2 of the policy, "When Benefits become Effective", are as follows:

> "If, before attaining the age of sixty years and while no premium on this policy is in default, the Insured shall furnish to the Company due prooof that he is totally * * * disabled * * * the Company will

grant the following benefits during the remaining lifetime of the Insured so long as such disability continues";

and section (b) thereof provides:

"The Company will also, after receipt of such due proof, waive payment of each premium as it *thereafter* becomes due during such disability."

The conditions further provided:

"The amount payable in any settlement hereof shall not be decreased because of the *disability benefits granted.*"

See original policy, which is not copied in the record, but under stipulation 7, Record, p. 92, was certified as a part of the record.

By subsequent endorsement made June 8, 1931, the premiums were changed from annual to quarterly payments of $49.05 payable on the 16th days of May, August, November and February in each year. (See page 4 of the original policy.)

The policy contained further provisions that:

"A grace of thirty-one days shall be granted for the payment of each premium after the first, *during which days of grace the insurance shall continue in force.*"

and

"If this policy shall become payable by the death of the Insured, *any unpaid premium* or premiums necessary to complete premium payments *for the policy year* in which such death occurs, including *over-due premiums* if death occurs within the days of grace, shall be deducted from the amount payable."

By a supplementary rider attached to the policy, among other things, under the title, "Benefits if proof delayed and no premium in Default", it was provided:

"If, while no premium is in default, the proof furnished the Company * * * is such as to entitle the Insured with the disability benefits * * *, and if due proof is also furnished the company that such disability has been continuous since its beginning, the Company will:

"(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of such proof, instead of as of the date of receipt of such proof, and

"(b) Return any premium *due* after the *beginning of such disability* which has been paid during the continuance thereof";

and further, under the heading, "Benefits if *Premium in Default not over Six Months*", provided:

"If, not later than *six months after the due date of any* premium in default, and provided no *previously due* premium is also in default, due proof is received by the Company before the Insured shall have attained the age of sixty years, that the Insured was totally and permanently disabled * * * at the date when such premium in default fell due, and has been *continuously so disabled* since said *due date*, the policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefit shall be the same as if such default had not occurred."

The quarterly installments of premiums were paid as they matured up to and including the one payable on August 16, 1931, more than eighteen months after the date of the policy. The effect of this under the grace clause was to keep this insurance in full force and effect until December 17, 1931.

On a date, not definitely ascertained, but between November 15th and December 17, 1931, when the policy under the grace clause was in full force in all its provisions, Cooksey became totally and permanently disabled, both physically and mentally, not only from engaging in any gainful enter-

prise, but also from *preparing, executing and forwarding to the defendants proofs* of his said disability, and this disability continued until his death, which occurred on or about January 20, 1932.

During the interval between December 17th and his death, and during the lifetime of Cooksey, and within the six months' period, J. L. Brown, the agent for the petitioner and who had sold the policy sued on and collected the premiums and prepared extension notes, told one E. E. Johnson, an attorney at law and uncle of the deceased and who later qualified as administrator and is the plaintiff in the procedure referred to, "that if Cooksey was totally disabled before the thirty-one days expired the petitioner would pay the policy if anything happened," and thereby lulled those about Cooksey, who was at that time too ill to attend to such matters, into the justified belief that there was no necessity for paying the premiums or asking to have the policy reinstated, as he had a perfect right to do so under the six-month provision. The same agent told Mrs. Ethel Cooksey, the widow of the decedent (see her evidence p. 57 R.), "the day after Cooksey was carried to the hospital that he could fix it all right."

Petitioner was notified of the death of Cooksey under date of January 27, 1932 (see R. p. 33), and the claim was then made, not only under the policy at bar, but under another policy which was paid. The Company accepted liability under the latter policy and paid it, but finally, under date of February 16, 1932, declined liability under the policy in question, *only* because, as stated in their letter, "according to our office records this policy *lapsed* for the nonpayment of the premium due November 15, 1931," and after quoting at length the provisions of the said policy, under the heading, "Supplementary Benefits to Section Entitled 'Benefits in Event of Total and Permanent Disability before Age 60' ", containing the six months' provision, concluded:

"As this policy lapsed *prior* to the date Mr. Cooksey *became disabled,* there is nothing to be considered" (see R. p. 33).

We submit that the policy did not lapse on the date mentioned.

E. E. Johnson, who had qualified as administrator, and after refusal of petitioner to pay the policy, filed the notice of motion in the Circuit Court of Rappahannock County, Virginia, (see original Notice, R., pps. 1 to 5 inclusive). This notice of motion was then removed to the District Court for the Western District of Virginia upon the ground of diverse citizenship. Thereafter the notice was amended. (See R. pp. 10 to 17.) The motion sets out the grounds of recovery above stated. To this amended notice the petitioner filed a demurrer (see R. pp. 20 and 21) on April 20, 1933, which was overruled June 5, 1933 (see R. p. 22), and on the same day the petitioner filed its plea denying the contract in manner and form alleged, and set out seven separate grounds of defense, of which the second had ten subdivisions (R., p. 23), making 16 in all. Issue was joined on the pleadings and the evidence taken at Lynchburg commencing on June 16, 1933. At the termination of the plaintiff's evidence the defendant, on June 17th, and without undertaking to controvert any of the evidence introduced by the plaintiff, moved the court for a directed verdict for the defendant, which motion the court granted over the objection of the plaintiff, and directed the jury to find for the defendant, all of which was accordingly done; and upon this verdict a judgment in favor of the defendant was entered. To each of which acts and rulings the plaintiff excepted and moved the court to set aside the verdict as contrary to the law and the evidence (see R., p. 28), which motion was overruled and the plaintiff again excepted and final judgment was entered in favor of the defendant. From this judgment a writ of error was perfected to the Circuit Court of Appeals, which court reversed the District Court

and ordered the cause remanded to the District Court of the United States for the Western District of Virginia at Lynchburg with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Circuit Court of Appeals for the Fourth District. (See p. 106 R—Opinion pp. 99 to 105, R.)

II.

ASSIGNMENTS OF ERROR.

The assignments of error filed on August 28th are as follows:

(1) That the court erred in holding there was no issue of fact material for determination;

(2) That the court erred in directing a verdict in favor of the defendant; and

(3) That the court erred in refusing to sustain the motion to set aside the jury's verdict because contrary to the law and the evidence.

III.

QUESTIONS INVOLVED.

The questions involved and the manner in which they are raised are:

1st: When, if at all, did this insurance lapse? The plaintiff claims that the coverage in its entirety remained in full force and effect at least until December 17, 1931, the limits of the grace period.

2nd: Prior to any possible lapse the insured became totally and permanently disabled within the meaning of the policy sued on, whereby under the primary assumpsit of the policy the insured became entitled to all disability benefits, including the waiver of premiums, which prevented any lapse from thereafter occurring during such disability.

3rd: Under the express terms of the policy proofs of physical disability could have been made to the Company

at any time *within six months after default* provided no *previous* default had occurred, and this was done by the plaintiff after insured's disability.

4th: The refusal by the defendant on February 27th to consider the question of liability excused plaintiff from submitting further proofs.

5th: Within the grace period the insured became, not only physically but mentally incapable of filing any proofs, which excused him, during his lifetime, from so doing, if his disability continued so long.

6th: Under the provisions of the Virginia Code, Sec. 4228, the policy became uncontestable upon the grounds "relied on by the defendant", because the policy had been in force for more than one year prior to the death, and the contest of defendants is not "for the non-payment of premiums", nor for violation of conditions requiring the payment of additional premiums in event of naval or military service in time of war".

U. S. S. L. I. & T. Co. v. Massey, 159 Va. 832.

These questions all depend on the construction of the policy as applied to the evidence of the plaintiff, and arise under each of the assignments of error, 1, 2 and 3.

IV.

ARGUMENT.

Petitioner rests its case upon the rulings of the court in the case of Egan v. New Life Insurance Company, 67 Fed. (2d), 899; and upon the case of Bergholm v. Peoria Life Insurance Company, 284 U. S. 489.

The Egan case is not a well considered one, and in reading the opinion the Circuit Court of Appeals for the Fifth Circuit cites only one case in support of the conclusions reached, which is the Bergholm case.

The facts in the Egan case are not similar to the facts in

the Bergholm case, and the Bergholm case is not authority for the Egan case. In the last named case the policy provided:

> "If, after this policy shall have been in force one full year and before default in the payment of any premium the company receives due proof that the Insured before attaining the age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the company shall waive payment of such premium as it thereafter becomes due during the Insured's said disability."

And the court held, considering this clause, that while it was contended by the committee of the insured that he was insane and unable to personally furnish proof of his disability, that condition of the policy was inoperative and waived, the contention was untenable. Says Judge Foster in delivering the opinion:

> "The policy is plain and unambiguous. The contract clearly contemplates that, if for any reason the insured is unable to promptly make proof of his disability warranting the suspension of premiums and the payment of the annual installments, some one else in interest must do for him. This is a condition precedent necessary to be complied with to fix liability under the policy. It is very material to the risk that proof of total disability be furnished promptly and while the policy is kept in force by the payment of premiums. The provisions of the policy so requiring are not to be considered waived or rendered inoperative simply because of misfortune overtaking the insured. Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, 52 S. Ct. 230, 76 L. ed. 416"

The opinion is clearly at variance and in conflict with the law as laid down in the case of Minnesota Mutual Life Insurance Company v. Marshall, 29 Fed. (2d) 977, and is not

supported by the Bergholm case. The facts and conclusions of law, as we find in the Bergholm case are entirely different from those in the Egan case.

Counsel for petitioner here contend that the Bergholm case overruled the Marshall case, and that the Egan case is in accord with the Bergholm case. Neither of the cases, however, is similar to the present case. Permit us briefly to demonstrate not only that the Bergholm case does not overrule the Marshall case, but that it was decided on its pecular facts not here present or in the Marshall case. The facts in the Bergholm case are, the face of the policy contained no provision for disability benefits; after the first year the premiums were not payable quarterly; the policy by super-added provisions only had a one month grace provision and the conditional disability clause; the assumpsit provision was merely a promise to pay $500.00 upon due proof of death in accordance with a clause thereto attached, subject, however, to the provisions of the policy. On the face of the policy there is no reference whatever to disability benefits, except the following:

> "If at the end of twenty years from date this policy is still in force and no benefits shall have been paid or allowed under this policy on account of the total and permanent disability of the insured, the insured shall have the guaranteed option to continue this policy as a twenty-year endowment."

In an unsigned addendum added to the policy we find the following:

> "Income Disability Clause: A part of policy 140964.
> "*Upon receipt by the Company of satisfactory proof* that the Insured is totally and permanently disabled as hereinafter defined the Company will—
> "1. Pay for the Insured all premiums becoming due hereon *after the receipt of such proof* and during the continuance of the total and permanent disability * * *
> "To entitle the Insured to the above Total and Permanent disability Benefits *such policy at the time of*

making claim for such benefits must be in full force and all premiums becoming due prior to the time *of making claim must have been duly paid by the Insured.*"

Mr. Justice Sutherland, in delivering the opinion in the Bergholm case, says in part:

"There is evidence in the record from which it reasonably may be found that the insured was totally and permanently disabled from a time before the premiums first became in arrears, and that this condition continued until his death; but no proof thereof was furnished to the company.

The petitioners, nevertheless, contend that this is enough to bring into effect the promise of the company to pay the premiums which became due after the disability began. In support of this contention, Minnesota Mut. L. Ins. Co. v. Marshall, is cited. The pertinent provisions of the policy there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in payment of premiums, 'shall become totally and permanently disabled * * * and shall furnish satisfactory proof thereof, the Company will waive the payment of premiums thereafter becoming due,' and that 'upon the receipt of due proof of total and permanent disabilities * * * the Company will waive the payment of all premiums thereafter becoming due.' The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished."

Then Mr. Justice Sutherland further says:

"We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the ex-

> istence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof.* The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. Compare Brams v. New York L. Ins. Co., 299 Pa. 11, 14, 148 Atl. 855. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted." (Citing cases.)

In reading the opinion in the Bergholm case, it will be observed that the Marshall case is not overruled, but in effect affirmed.

The Egan case is not controlled by the Bergholm case; the facts and policy provisions being entirely too dissimilar; the Marshall case has never been overruled by any court in so far as we have been able to find; and it was admitted in the oral argument before the Circuit Court of Appeals in the present case that if the principles enunciated in the Marshall case were law petitioner had no defense; in fact Judge Soper asked one of counsel for petitioner when making the oral argument that if the Marshall case were sound law what would the position of counsel for petitioner be? And the response was, *petitioner would have no case if the Marshall case were sound law.*

There is no provision in the policy sued on here even in the super-added conditions, resembling these *express* ironclad conditions precedent, mentioned in the Bergholm case.

Bearing in mind the primary affirmative assumpsit in the main body of the policy, "If the Insured is totally and presumably permanently disabled * * * will pay to the Insured Forty-five Dollars monthly during such disability, besides *waiving premium payments*", this express undertaking cannot be nullified by adding inconsistent "weasel worded" provisions in a subsequent portion of the policy and thus make the first provisions a snare and a delusion

for the unwary insured, who are paying good money for the protection granted.

This Honorable Court held that the provision in the Marshall policy, "If the Insured, while the policy is in full force and before default in payment of premium shall become totally and permanently disabled, *and shall furnish* satisfactory proof thereof, the company will waive the benefit of premium thereafter becoming due", did not require such proof of disability as a condition precedent to a right to sue on the policy. Compare that with the language in the policy in the present case.

> "If the Insured is totally and presumably permanently disabled before age 60, will pay to the Insured Forty-five dollars monthly during such disability, besides waiving premium payments,"

even when coupled with the "weasel words" relied on now as limiting this express promise to pay:

> "If before attaining the age of 60 years, and while no premium on this policy is in *default,* the Insured shall furnish to the Company due proof that he is totally * * * disabled— * * * the Company will grant the following benefits during the remaining lifetime of the Insured."

And this case lines up with the Marshall case. So far as the import and effect on the minds of layman or lawyer is concerned, there is no difference between the Marshall case and the present case.

If the construction placed on these provisions is as contended for by petitioner, it is clearly violative of Sections 4315 and 4317 of the Virginia Code.

Section 4315 forbids the issuance of any policy of insurance

> "against loss or damage from disease or by bodily injury by accident or both * * * unless it contains in substance the following provisions * * *:

"(i) A provision that no such policy shall limit the time within which proofs of claims shall be furnished to the Company to a period *less than ninety days from* the date of death, dismemberment or loss of sight, or *from the termination of any other disability.*"

And Section 4317 provides:

"No company or agent shall issue or deliver in this state any policy which conflicts with any provision of the two preceding sections. A policy issued in violation of the same shall be held valid and shall *be construed as provided in said sections,* and when any provision in the policy is in conflict with any provision of the said section the rights, duties and obligations of the company and policy-holder and the beneficiary shall be governed by the provisions of the said sections."

These statutory provisions are mandatory, and we imagine will be followed by the Federal Courts.

Judge Parker in the case of Fountain & Herrington v. Mutual Life Ins. Co., 55 Fed. (2d) 120, says:

"The rule as to following the laws of the states is that we *are* bound by *state statutes* relating to rights of property within the State."

And Mr. Justice McKenna, in the case of N. Y. L. Ins. Co. v. Cravens, 178 U. S. 389, says:

"It is well settled that the legislature of the state has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this state, and to prohibit them from doing so altogether if inclined."

And again on p. 398:

"A policy of mutual life insurance, it is contended, is an interstate contract, and the parties may choose its 'applicatory law'. Instances under the law of usury, * * * private international law, are cited as examples * * *. But if such cases apply at all they nec-

> essarily have limitations in the *policy* of the state. * * * But the interests of the state must be deemed to be expressed in *its laws.* The public policy of the state must be deemed to be authoritatively declared *by its courts.* Their *evidence we cannot oppose by speculations or views of our own.* Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced."

Counsel for petitioner in their petition (p. 3 thereof) contend that

> "The sole question presented in this case is whether insanity of the insured excused the failure to comply with an explicitly stipulated requirement of his life insurance policy to the effect that due proof of disability was a condition precedent to the waiver by the insurance company of the payment of premiums due on said policy."

When we assume that the contention is correct, it necessarily follows that the learned counsel concede the correctness of our views in regard to the other questions raised, and if the only question submitted here is whether, "*due proof of disability was a condition precedent to a waiver of premiums in the present case*"? we will confine what we have to say in regard to that single question.

Unquestionably the over-whelming majority of the state courts have passed upon this very question and laid down the rule that a condition precedent requiring notice of proof of disability is excused where the performance is impossible by reason of physical or mental incapacity of the insured, as where the insured is insane or unconscious during the period when proof should have been furnished.

Judge Soper in writing the opinion in the present case (p. 103, Record), says:

> "It must be conceded that the position of the defendant finds support in cases from two jurisdictions. New England Mutual Life Ins. Co. vs. Reynolds, 217

Ala. 151, 116 So. 151, 59 A. L. R. 1075. Whiteside vs. North American Acc. Ins. Co., 200 N. Y. 320. An overwhelming majority of the state courts that have passed upon the matter have, however, laid down the rule that a condition precedent requiring notice or proof of disability, is excused where its performance is impossible by reason of the physical or mental incapacity of the insured, as where the insured is insane or unconscious during the period when proof should have been furnished, and that the condition may be performed within a reasonable time after the incapacity is removed. Swann vs. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192. Rhyne vs. Jefferson Standard L. Ins. Co., 196 N. C. 717, 147 S. E. 6; Id., 199 N. C. 419, 154 S. E. 749; Levan vs. Metropolitan Life Ins. Co., 138 S. C. 252, 136 S. E. 304; Roseberry vs. American Benev. Assn., 142 Mo. App. 552, 121 S. W. 785. Continental Casualty Co. vs. Matthis, 150 Ky. 477, 150 S. W. 507; Comstock vs. Fraternal Acc. Assn. of America, 116 Wis. 382, 93 N. W. 22; Reed vs. Loyal Protective Assn., 154 Mich. 161, 117 N. W. 606; Woodmen's Acc. Assn. vs. Byers, 62 Neb. 673, 87 N. W. 546; and see 54 A. L. R. 611, note."

Then Judge Soper says (p. 104, R.)

"We think the rule announced by the majority of the state courts is the sound rule to apply. The situation is one where the parties may fairly be said to have contemplated a capacity to make the proof when disability should arise, for otherwise such a contract may prove a trap for the unwary by imposing conditions which incapacity may render it impossible to perform. There is, it is true, no language in the condition which qualifies it in the event that its performance should become impossible; but it is a general rule in the law of contracts, that impossibility may excuse a condition, though a condition precedent, if the existence or occurrence of the condition is no material part of the exchange for the promisor's performance, and the discharge of the promisor will operate as a forfeiture. Restatement of Contracts, Sec. 301; and see Illustrative Case (4). See also: Williston on Contracts, Vol. 2,

> Sec. 806. This principle, furthermore, has received recognition by the Supreme Court in *Insurance Companies vs. Boykin*, 12 Wall, 433, 436." * * *
>
> "The case should have been submitted to the jury with appropriate instructions, since the disease had made such progress by December 14, 1931, that the jury might have found that the insured was incapable on or before that date of complying with the provisions of the policy in regard to notice of disability."

One Virginia case to which we particularly direct the attention of the court is, that of *Atlantic Life Insurance Company v. Swann*, which twice went to the Supreme Court of Virginia, reported the first time in 156 Virginia, p. 852, the second time in 160 Virginia, p. 125. The question was raised on the first trial by a demurrer to a replication filed by plaintiff to defendant's plea, in which replication the plaintiff in effect said, that when the premium fell due in the grace period plaintiff was mentally and physically incapable of giving notice of his condition, by which replication the question was squarely presented. The trial court sustained the demurrer to the replication; the Supreme Court reversed the trial court, and on page 862 of the report said:

> "The insured could not present proofs before his disability, and he certainly could not present *proofs after he became mentally and physically incapable of doing so.* It would be unreasonable to say that he should present proofs to the company if he were insane or unconscious. Such a construction of the policy would render it of *no value* to the insured *in such a case*, although he may have been influenced thereby to purchase the insurance and has paid for the right to have the premiums waived."

On the second trial of the case, the trial court appears to have given an improper instruction using the words "reasonably incapable of notifying", and by reason of the use

of these words, or rather the word "reasonably", being a part of the instruction the case was again reversed.

And it is true the Supreme Court of Virginia did say when the case was before it the last time, as reported in 160 Virginia:

> "A careful examination of the evidence discloses that the plaintiff has failed to carry the burden of proof imposed upon her. On the other hand, from the evidence of numerous witnesses, we can draw only one conclusion, and that is that the insured was neither physically nor mentally incapacitated from performing his part of the contract of insurance in regard to furnishing proof, or giving the required notice." (160 Va. 130)

The first time the Swann case was tried the trial court was clearly wrong in sustaining the demurrer to the replication. The question ought to have been submitted to the jury to determine the fact whether the disability really existed.

In the second trial the trial court allowed the evidence to go the jury and the verdict was in favor of the plaintiff; but the evidence was insufficient to sustain the verdict.

Applying the principles in the Swann case to the present case, if the evidence is insufficient to establish the required proof of disability, then we have no case and all we asked the District Trial Court to do was to submit the question of disability to the jury, which request was declined. There was, we submit, evidence sufficient to entitle us to a jury hearing.

Judge Soper in delivering the opinion in the Circuit Court of Appeals (p. 105 R.) says:

> "The evidence of the plaintiff tended to show mental incapacity to furnish the proof, as well as total and permanent disability prior to December 17, 1931, when the period of grace permitted by the policy expired. Proof of disability might properly have been furnished at any time before the end of that period, in com-

pliance with the requirement that it be furnished 'while no premium on this policy is in default'. The defendant, contending that it might not be furnished after November 16, places some reliance on the provision of Section 12 of the policy that, 'all premiums are payable on or before their due date * * *'. But that language is immediately followed by the grace provision: 'A grace of 31 days shall be granted for the payment of each premium after the first, during which days of grace the insurance shall continue in force.' No premium could accurately be termed 'in default' in view of this provision, until the period had run; for, as pointed out in Minnesota Mutual Life Ins. Co. vs. Marshall, *supra*, p. 979, in answer to a similar contention: 'An obligation is due during the entire period during which it may be paid, whether that period extends over one day, three days, or thirty days. The premium was not really due, in the sense that the failure to pay it would result in a forfeiture of the policy, until the grace period had expired.'

The case should have been submitted to the jury with appropriate instructions, since the disease had made such progress by December 14, 1931, that the jury might have found that the insured was incapable on or before that date of complying with the provisions of the policy in regard to notice of disability."

V.

QUESTIONS INVOLVED AND AUTHORITIES IN SUPPORT OF OUR POSITION WITH REFERENCE TO THE QUESTIONS.

1. When, if at all, did this insurance lapse?

McMaster v. New York Life Insurance Co., 183 U. S. 25, 46 L. Ed. 64.

Osborn v. Rogers, 1 N. Y. Sup. 623, 624, 49 Hun. 245.

Pashley v. Third Methodist Church, 42 N. E. 13.

Arnot v. Union Salt Co., 79 N. E. 718.

Renner v. Bank of Columbia, 9 Wheat 581, 584.

2. Prior to any possible lapse in the policy, the insured became totally and permanently disabled, and entitled, under the primary assumpsit of the policy, to all the disability benefits, including the waiver of premium, which prevented any lapse from thereafter occurring during such disability.

McMaster v. New York Life Ins. Co., 183 U. S. 25.
Minnesota Mutual Life Ins. Co. v. Marshall, 29 Fed. (2d) 977.
Stratton v. New York Life Ins. Co., 155 Va. 259.
Harrison v. Provident Life Ins. Co., 141 Va. 659, 671.
Atlantic Life Ins. Co. v. Swann, 156 Va. 852.
New York Life Ins. Co. v. Curry, 115 Ky. 100, 61 L. R. A. 268, 103 Am. St. 297.
Knights of Columbus v. Burroughs, 107 Va. 688, 17 L. R. A. (N. S.) 246.
U. S. v. Bank of N. C., 6 Pet. 29, 8 L. Ed. 308.
Wiggins v. Knights of Pythias, 31 Fed. 122, 125.
Josephine Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311, 72 L. Ed. 395.
Peoria Life Ins. Co. v. Bergholm, 50 Fed. (2d) 67.

3. Under the express terms of the policy sued on, proof of prior physical disability could have been made at any time within six months after default, provided no prior default had occurred.

Minn. M. L. Ins. Co. v. Marshall, 29 Fed. (2d) 977.
McMaster v. N. Y. L. I. Co., 183 U. S. 25, 40, 46 L. Ed. 64.

4. The refusal by the defendant on February 27th to consider the question of liability excused plaintiff from submitting further proofs of disability, if any were otherwise requisite.

Royal Ins. Co. v. Martin, 192 U. S. 149, 162, 48 L. Ed. 385, 389.
Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. Ed. 866, 870.

National U. F. I. Co. v. Burkholder, 116 Va. 942, 948.
Continental Cas. Co. v. Lindsay, 11 Va. 389, 391.

5. Within the grace period the insured not only became totally disabled, but also physically and mentally incapable of filing proofs, which excused him during his lifetime from so doing.

Atlantic Life Ins. Co. v. Swann, 156 Va. 852.
Insurance Co. v. Boykin, 12 Wall. 433, 20 L. Ed. 433, 439.
R. & D. R. R. Co. v. Powers, 149 U. S. 43, 45, 37 L. Ed. 412, 413.
North River Ins. Co. v. Becnel, 33 Fed. (2nd) 231, 232.
Bass v. N. & W., 100 Va. 1, 8.
Bernstein v. Bord, 146 Va. 670.

6. Under the provisions of Virginia Code, Sec. 4228, the policy became incontestable upon any grounds except for the nonpayment of premiums.

Sec. 4228 Virginia Code.
U. S. S. L. I. and T. Co. v. Massey, 164 S. E. 529.
Whitfield v. Aetna Life Ins. Co., 205 U. S. 489, 501.
Metropolitan Life Ins. Co. v. Conway, 252 N. Y. 449, 169 N. E. 642.
Northwestern Mutual Life Ins. Co. v. Johnson, 254 U. S. 96, 65 L. Ed. 155.

CONCLUSION.

Considering the liberal construction put upon all policies of insurance containing similar provisions to the present, and considering the policies adopted by a great majority of courts in the states—both State and Federal Courts—we conclude that notice of disability is not required where the insured is unable physically or mentally to give it. No insurance company can waive the payment of a premium on account of disability of the insured until the company

knows of the *disability;* but when the company does know of the disability the premium waiver date will be *when the disability occurred.*

Illustrating, suppose a premium is due, say on the first day of a month—last day of the grace period—and the insured on his way to the office of the insurer to pay the premium suffers a stroke of paralysis and does not get to the office, and that by reason of the stroke he is from that very moment unable to speak or to move hand or foot, and died within ten days thereafter.

The company receives no notice of the disability until after the death of the insured. Should the company he allowed under such conditions to escape liability on either its unconditional promise to pay the insured in event of death, or its promise to waive the payment of premiums in event of disability? Unquestionably not.

In the present case the insured became disabled mentally and physically from giving the notice required by the policy while the policy was in force. The company did not receive notice of the disability until after the death of the insured because the insured was unable to give it. And why unable to give it? Because he was physically and mentally incapacitated.

Counsel for plaintiff in the District Court asked that the question be submitted to a jury to determine whether the insured was incapable on and before the last day of grace of complying with the provisions of the policy in regard to notice of disability, and whether the incapability in that regard continued until his death?

The request was denied by the District Court, and we respectfully pray that the relief asked by petitioner be denied, and that no writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit

Court of Appeals for the Fourth Circuit as prayed for in the petition.

Respectfully submitted,

JNO. S. BA
Attorney
Tower
Washington, D. C.

W. F. MOFFETT,
Washington, Virginia.

BURNETT MILLER,
Culpeper, Virginia.
Attorneys for the Administrator of Benjamin F. Cooksey, deceased.